STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 31, 2007
v	No. 269427 Oakland Circuit Court
JOSHUA MICHAEL MARCHANT, Defendant-Appellant.	LC No. 2005-204880-FH

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 1-1/2 to 15 years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts And Procedure

Defendant's conviction arises from the discovery of cocaine during the execution of a search warrant at James Broughton's home on September 12, 2005. Three individuals were present when members of the Oakland County Narcotics Enforcement Team entered the home. The first person the team encountered was Gregory Mehlhorn, who was closest to the front door. Defendant stood in front of a couch on which a young female was sitting. A digital scale, hand scale, and plastic baggies were on top of an end table next to the couch. Three packages of crack cocaine were discovered on the floor, behind the end table and against a wall. It appeared to Detective Kevin Cronin of the Farmington Hills Police Department that the packages were thrown behind the end table. Defendant was the closest individual to the packages. Sergeant Brent Miles of the Oakland County Sheriff's Department interviewed defendant after he was arrested. Defendant told Sergeant Miles that he and Mehlhorn used cocaine for the past three days, that Mehlhorn bought that cocaine found in the trailer home, and that he planned to smoke the cocaine with Mehlhorn later that day.

II. Due Process And Effective Assistance Of Counsel

Defendant claims that the trial court deprived him of due process by subverting his efforts to call Mehlhorn as a witness to support his defense that he did not possess the cocaine. Because defendant did not object on this ground at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Whether a defendant is accorded due process depends on the facts of the case. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). A defendant's due process right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). "It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Here, the trial court entered a discovery order under MCR 6.201, which required that defendant provide the prosecutor with the names of all witnesses he intended to call within 14 days of trial. Defense counsel did not name Mehlhorn as a witness until after the trial began, and the trial court denied his offer to introduce evidence of statements made by Mehlhorn. The trial court's refusal to adjourn the trial so that the Mehlhorn could be transported from a correctional facility to testify at trial was within its discretion to fashion an appropriate remedy for defendant's noncompliance with the discovery order. MCR 6.201(J); *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). Examining defendant's newly raised claim in the context of his failure to comply with the discovery order, we find no plain due process error. *Carines*, *supra* at 763.

We limit our review of defendant's alternative claim of ineffective assistance of counsel to the existing record because defendant did not move for a new trial or evidentiary hearing on this issue. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). A claim of ineffective assistance requires a showing that defense counsel's performance fell below an objective standard of reasonableness and prejudice. *Toma*, *supra* at 302; *Thomas*, *supra* at 456. The failure to call a witness can constitute ineffective assistance if it deprives a defendant of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

It is not apparent from the existing record what testimony Mehlhorn would have provided if defense counsel properly listed him as a witness or timely acted to produce him at trial. Defendant has the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). But even if we were to accept Mehlhorn's preliminary examination testimony as an offer of proof with regard to Mehlhorn's testimony, we would not reverse.

Defendant's own testimony at trial, if believed, supported his defense that he did not possess the cocaine. Defendant denied having anything to do with the cocaine found in the trailer home or making any statements to Sergeant Miles regarding the cocaine. Mehlhorn presented himself at the earlier preliminary examination as a codefendant who already pleaded guilty to possessing the cocaine. Mehlhorn indicated that defendant worked for him and that he told the police that he did not want defendant to get into trouble because he considered him to be like a son. Further, while Mehlhorn indicated no knowledge of defendant's statements to Sergeant Miles, he testified, contrary to defendant's trial testimony, that defendant smoked cocaine three days before the search warrant was executed. Therefore, while Mehlhorn might have corroborated part of defendant's trial testimony, assuming that he would testify consistent with his preliminary examination testimony, considering Mehlhorn's relationship with defendant

and contradiction of defendant's trial testimony regarding his cocaine use, the record does not support defendant's claim that he was denied a substantial defense.

III. Sufficiency Of The Evidence

Defendant claims that the evidence was insufficient to establish that he possessed the cocaine found in the trailer home. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Possession of a controlled substance may be joint, with more than one person actually or constructively possessing it. *Id.* at 520. Constructive possession exists when there is a right to exercise control over the controlled substance and there is knowledge of its presence. *Id.*; see also *People v Hardiman*, 466 Mich 417, 421 n 4; 646 NW2d 158 (2002). The totality of the circumstances are considered to determine if there is a sufficient nexus exists between a person and the controlled substance to find constructive possession. *Wolfe, supra* at 521.

Here, defendant's statements to Sergeant Miles that he used cocaine with Mehlhorn for the past three days, knew about the cocaine found in the trailer home and intended to use it with Mehlhorn, combined with Detective Quinn's testimony that defendant was found in close proximity to the cocaine, supports a reasonable inference that defendant had at least a right to control the cocaine and knew of its presence. Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant jointly and constructively possessed the cocaine with Mehlhorn.

IV. Applicability Of Jury Instructions

Defendant next claims that the trial court erred in refusing his request for a "mere presence" jury instruction. When jury instructions involve questions of law, our review is de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). A trial court's determination regarding the applicability of a jury instruction to the facts of the case is reviewed for an abuse of discretion. *Id*. If a defendant requests a jury instruction on a defense theory and it is supported by the evidence, the trial court must give the jury instruction. *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006).

A defendant claiming that an applicable instruction on a defense theory was not given bears the burden of establishing that the failure to give the instruction resulted in a miscarriage of justice. MCL 769.26; *Hawthorne, supra* at 182; *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). This Court reviews instructions as a whole to determine if a trial court committed error requiring reversal. *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). "Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *Id.*

We agree with defendant that a person's mere presence is insufficient to prove that a person possessed a controlled substance. *Wolfe, supra* at 520. Further, defendant's testimony, if believed, supports an inference that he was merely present. He denied having anything to do with the cocaine found in the trailer home.

But it is apparent from the trial court's denial of defense counsel's request for a "mere presence" instruction that it understood that defense counsel was seeking a jury instruction formulated for an aiding and abetting charge. Further, defense counsel did nothing to correct the trial court's understanding of the requested jury instruction. While the use of the standard criminal jury instructions is not required, *People v Stephan*, 241 Mich App 482, 496; 616 NW2d 188 (2000), we note that defendant relies on the mere presence instruction formulated for an aiding and abetting charge in CJI2d 8.5.

Under Michigan's aiding and abetting statute, MCL 767.29, aiding and abetting is not a separate substance offense, but rather a theory that permits vicarious liability to be imposed on accomplices. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). An aiding and abetting instruction is proper where there is evidence that "(1) more than one person was involved in the commission of the crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995), lv den 450 Mich 999 (1996). A person's mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider and abettor. *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983).

Because defendant was not charged as an aider and abettor, we conclude that the request for a mere presence instruction formulated for an aider and abettor charge fails, as a matter of law. Moreover, the trial court instructed the jury that "[i]t is not enough if the defendant merely knew about the cocaine. The defendant possessed the cocaine only if he had control of it or the right to control it either alone or together with someone else." Examined as a whole, the jury instructions fairly presented the applicable law to the jury and protected defendant's rights. Therefore, defendant's claim with respect to this issue fails.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood